

Jason Jenkins was convicted, after a jury trial, of intimidation¹ as a Class C felony, battery² as a Class C felony, three counts of criminal confinement,³ each as a Class B felony, attempted robbery⁴ as a Class B felony, carrying a handgun without a license⁵ as a Class A misdemeanor, and resisting law enforcement⁶ as a Class A misdemeanor. He was sentenced to consecutive sentences, resulting in an aggregate sentence of twenty-four years. He appeals, raising three issues, which we restate as follows:

- I. Whether the jury rendered inconsistent verdicts by finding Jenkins guilty of intimidation but not guilty of pointing a firearm; and by finding him guilty of battery, without finding that he inflicted serious bodily injury during the robbery;
- II. Whether sufficient evidence was presented to support Jenkins' convictions for intimidation and confinement; and
- III. Whether the trial court abused its discretion when it imposed consecutive sentences.

We affirm in part and remand for sentencing clarification.

FACTS AND PROCEDURAL HISTORY

On February 14, 2005, Jenkins and Tyrone Denny drove to Quantico Brisker's home. Brisker, who was a marijuana dealer and had over eighteen pounds of marijuana at his home, pulled into his driveway, saw the men, and quickly attempted to enter his home.

¹ See IC 35-45-2-1.

² See IC 35-42-2-1.

³ See IC 35-42-3-3.

⁴ See IC 35-42-5-1.

⁵ See IC 35-47-2-1.

Jenkins and Denny caught up with Brisker and hit Brisker on his forehead with handguns rendering him unconscious. When Brisker regained consciousness, Jenkins and Denny were kicking him. Jenkins and Denny forced Brisker to unlock the door to his home and allow them to enter.

Brisker's wife and son were at home when the men entered. Jenkins and Denny repeatedly asked Brisker at gunpoint where he kept his money. Brisker and his wife went to their spare bedroom and offered to let the men have the marijuana stored there, but Jenkins and Denny refused. The wife called for her son to join them in the spare bedroom.

Denny and Jenkins made Brisker remove all his clothing. Denny then forced Brisker to walk to the garage while Jenkins, who had a gun, remained with the wife and son in the spare bedroom. The wife held the son on her lap and closed her eyes to pray. When she opened her eyes, she realized that Jenkins had left the room. The wife and son left the room to look for Brisker.

Denny then reentered the home, encountered the wife and son, and placed a gun to the son's head telling the wife he would shoot the son if the wife did not tell Brisker to open the garage door.

The police arrived at the home, and Denny released the son. Jenkins jumped the home's fence and attempted to run away. Denny then attempted to jump the fence. Both were apprehended. The State charged Jenkins and Denny with attempted robbery, three counts of criminal confinement, battery, intimidation, pointing a firearm, carrying a handgun

⁶ See IC 35-44-3-3.

without a license, and resisting law enforcement. The jury found Jenkins not guilty of pointing a firearm but guilty of the lesser-included offense of attempted robbery as a Class B felony, and guilty of all of the other charges.

At sentencing, the trial court found as an aggravator that Jenkins had previous felony convictions for assault with intent to commit severe injury and for possession of a narcotic drug. The trial court found as a mitigator that Jenkins had a child. The trial court ordered Jenkins to serve his sentences for attempted robbery, confinement of the wife, and intimidation consecutively, resulting in an aggregate sentence of twenty-four years. Jenkins now appeals.

DICUSSION AND DECISION

I. Inconsistent Verdicts

When we review a claim of inconsistent jury verdicts, we take corrective action only when the verdicts are contradictory and irreconcilable. *Lapitok v. State*, 817 N.E.2d 630, 643 (Ind. Ct. App. 2004), *trans. denied*. In resolving this type of claim, we neither interpret nor speculate about the thought process or motivation of the jury in reaching its verdict. *Id.*

Jenkins claims that the jury's verdicts in two instances were "fatally inconsistent." *Appellant's Brief* at 7. First, he argues that the jury inconsistently found him not guilty of pointing a firearm but guilty of intimidation. He argues that pointing a firearm is an "essential element" of intimidation and that the jury could not find him guilty of intimidation as a Class C felony if they also found that he did not point a firearm. *Appellant's Brief* at 9. However, pointing a firearm is not an essential element of intimidation as a Class C felony. IC 35-45-2-1 provides that intimidation is a Class C felony "if, while committing it, the

person draws or uses a deadly weapon.” Here, there was evidence that Jenkins drew or used a deadly weapon. Brisker testified that Jenkins’ gun was visible throughout the offenses and the wife testified that Jenkins still had his weapons when the group was confined in the bedroom. Thus, the verdicts are not inconsistent.

In the second instance, Jenkins argues that the jury was inconsistent when it found him guilty of attempted robbery as a Class B felony and also guilty of battery as a Class C felony. He specifically contends that “serious bodily injury is the only element distinguishing attempted robbery as a Class A felony from attempted robbery as a Class B felony.” Because the jury found him guilty of the lesser-included offense of attempted robbery as a Class B felony and not as a Class A felony, it was inconsistent to find him guilty of battery as a Class C felony which “relies on the essential element of serious bodily injury.” Thus, he argues that the jury’s findings are inconsistent. *Appellant’s Brief* at 10.

However, battery is a Class C felony if it results in serious bodily injury to any other person *or* if it is committed by means of a deadly weapon. IC 35-42-2-1. Thus, it was not necessary for the jury to find that the battery resulted in serious bodily injury in order to convict Jenkins of the offense. Because there was evidence that Jenkins committed the offense while holding a gun, the verdicts were not inconsistent.

II. Sufficiency of the Evidence

Jenkins argues that insufficient evidence was presented to support his conviction for intimidation because: 1) he did not personally point the gun at the child and threaten to shoot, 2) he did not aid in doing so, and 3) he was not aware that Denny pointed the gun. Additionally, he argues that the evidence was insufficient to support his conviction for

confinement of the child because the child entered the spare bedroom at his mother's request.

When we review a claim of insufficient evidence, we neither reweigh the evidence nor judge the credibility of the witnesses. *Abney v. State*, 855 N.E.2d 226, 228 (Ind. Ct. App. 2006). We consider only the evidence and all reasonable inferences favorable to the judgment. *Id.* We will affirm the conviction unless we conclude that no reasonable factfinder could find the elements of the crime proven beyond a reasonable doubt. *Id.*

Jenkins does not challenge the sufficiency of the evidence to convict Denny of intimidation. Rather, he contends that the evidence was insufficient to prove that Jenkins knowingly aided Denny in committing the offense. Here, both Denny and Jenkins were armed throughout the offenses, entered upon the Briskers' property with the intent to commit robbery, and the wife testified that Jenkins still had his weapon when the group was confined in the bedroom. Additionally, Jenkins was present and an active participant in the offenses, and did not flee until the police arrived. The evidence is sufficient to support Jenkins' conviction for intimidation.

To convict Jenkins of confinement of the child, the state was required to prove that Jenkins knowingly confined the boy without his consent. IC 35-42-3-3. The evidence at trial established that Jenkins had his gun visible while the group was in the spare bedroom and that Jenkins kept the wife in the room with her son. *Tr.* at 21, 71.

If the testimony believed by the trier of fact is enough to support the conviction, then the reviewing court will not disturb it. *Ferrell v. State*, 746 N.E.2d 48, 51 (Ind. 2001). Thus, the evidence at trial was sufficient for the jury to conclude that Jenkins committed the offenses of intimidation and confinement.

III. Consecutive Sentencing

After holding that the aggravating and mitigating factors balanced, the trial court ordered Jenkins to serve his sentences for attempted robbery, confinement of the wife, and intimidation consecutively, resulting in an aggregate sentence of twenty-four years. Jenkins argues that his consecutive sentencing was improper because of the balanced aggravating and mitigating circumstances.

A trial court is permitted to determine whether terms of imprisonment shall be served concurrently or consecutively by considering aggravating and mitigating circumstances. IC 35-50-1-2. However, when the trial court finds those circumstances in balance, “there is no basis on which to impose consecutive terms.” *Marcum v. State*, 725 N.E.2d 852, 864 (Ind. 2000).

Here, the trial court found as a mitigator that Jenkins had a child. The trial court only found as an aggravator that Jenkins had previous felony convictions for assault with intent to commit severe injury and for possession of a narcotic drug. However, it is undisputed that there were also multiple victims of these crimes -- Brisker, his wife, and their son. The involvement of multiple victims in an offense can justify the imposition of consecutive sentences. *Altes v. State*, 822 N.E.2d 1116, 1126 (Ind. Ct. App. 2005), *trans. denied*. Thus, because the valid aggravating circumstance of multiple victims was present in this case to warrant consecutive sentencing, we remand it to the trial court for clarification of its sentencing order.

Affirmed in part and remanded for sentencing clarification.

DARDEN, J., and MATHIAS, J., concur.

